

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of Frank Ouellette

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above-matter came on for a hearing before Administrative Law Judge Steve M. Mihalchick on April 7, 2006 at 9:00 a.m. at the Office of Administrative Hearings, 100 Washington Square, Suite 1700, Minneapolis, Minnesota. The hearing record closed at the conclusion of the hearing on April 7, 2006.

Michael J. Tostengard, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, MN 55101-2130, appeared on behalf of the Department of Labor and Industry.

Respondent Frank Ouellette, 31148 142nd Street N.W., Princeton, MN 55371, appeared on his own behalf.

STATEMENT OF ISSUES

1. Did Respondent engage in unlicensed residential building contractor activities in violation of Minn. Stat. § 326.84, subds 1 and 1a?^[1]
2. Did Respondent violate a Consent Cease and Desist Order in violation of Minn. Stat. § 326.91, subd. 1 (5)?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Department does not currently license Frank Ouellette in any capacity.^[2]

2. Mr. Ouellette submitted an application for a residential building contractor's license to the Department in 2002. Because Mr. Ouellette had a criminal conviction for mail fraud and tax evasion in 2000, the Department agreed to issuance of a conditional contractor's license, to which Mr. Ouellette consented.^[3]

3. On March 25, 2004, the Department issued a Consent Order revoking Mr. Ouellette residential building contractor license.^[4]

4. On July 6, 2004, the Department issued a Consent Cease and Desist Order ordering Mr. Ouellette, individually and doing business as Sided Designs, Inc., to cease and desist from engaging in the work that would required residential building contractor, remodeler, or roofer license. Mr. Ouellette consented to entry of the Consent Cease and Desist Order on June 17, 2004.^[5]

5. Matthew Eicher, a homeowner in Elk River had had storm damage to his home.^[6] Mr. Eicher wanted one contractor to do the job. Mr. Eicher decided that Mr. Ouellette and his company, Sided Designs, Inc., would do a good job. On October 5, 2005, Mr. Eicher signed an "Assignment of Interests" (Assignment) with Mr. Ouellette. Mr. Eicher understood that the Assignment gave Sided Design and Mr. Ouellette power to deal with Mr. Eicher's insurance company. Among other things, the Assignment provided:

It is agreed that Sided Designs will complete said needed repairs and or replacement in a professional workmanship like manor.

Side Designs and myself have signed an agreement for the repair and or replacement of siding, windows, gutters & downs, soffit, lights, roof, trim on my home.

Sided Designs agrees to complete said work for the total sum agreed upon by Sided Designs and my insurance company.^[7]

6. Sometime after signing the Assignment, the insurance company told Mr. Eicher that Mr. Ouellette added several more windows to the estimate that were not in fact damaged.^[8]

7. When Mr. Eicher was unable to reach Mr. Ouellette by telephone for nearly a month, he contacted the Department to find out if Mr. Ouellette was a licensed contractor.^[9] Chris Williams, a senior residential contractor investigator for the

Department, received Mr. Eicher's call.^[10] Ms. Williams informed him that Mr. Ouellette did not have a license and asked Mr. Eicher to send her a copy of the Assignment.^[11] He faxed it to her on October 31, 2005.^[12]

8. On or about October 31, 2005, Ms. Williams reviewed the document. She determined that because the Assignment specified work that required two or more special skills and included roofing, the statutes required Mr. Ouellette to be licensed.^[13] She contacted Mr. Ouellette.

9. On November 1, 2005, Frank Ouellette wrote Mathew Eicher and informed him that Sided Designs, Inc. was withdrawing Sided Designs, Inc.'s. "Assignment of Interest."^[14] Mr. Ouellette cancelled the Assignment of Interest after the Department contacted Mr. Eicher.^[15]

10. As a matter of practice, Sided Designs and Mr. Ouellette routinely require customers to sign an Assignment of Interest form and then later, a second separate document titled "Terms and Agreement," before performing any work.^[16] The "Terms and Agreement" document provides that "(i)n the event Sided Designs has contracted to perform roofing or window Purchase and installation, the homeowner will act as the general contractor and Sided Designs will be the subcontractor."^[17] Mr. Ouellette asserts that because homeowners are not required to be licensed to work on their own homes, the homeowner can act as a general contractor and he and Sided Designs can legally perform work as an unlicensed subcontractor.^[18]

11. Both the Assignment form and the Terms and Agreement form created by Mr. Ouellette provide that Sided Designs will be paid for work performed.^[19]

Procedural Findings

12. Mr. Ouellette was served with the Notice and Order for Hearing on December 12, 2005.

13. The prehearing conference was held as scheduled on January 26, 2006.

14. The hearing was held as scheduled on April 19, 2006.

15. At the hearing, the Department withdrew Count II, which related to failing to provide a three-day right to cancel notification.

Based upon the foregoing Findings of Fact, and for the reasons set forth in the attached Memorandum, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Labor and Industry and the Administrative Law Judge have jurisdiction in this matter under Minn. Stat. §§ 45.027, 326.91, and 14.50.

2. The Respondent was given timely and proper notice of the hearing in this matter.
3. The Department has complied with all procedural requirements of law.
4. The Department must prove by a preponderance of the evidence that the alleged violations occurred.^[20]
5. Minn. Stat. § 326.84, subd. 1, requires residential building contractors to be licensed. Residential building contractors may not perform work without a valid license. Subdivision 1a of section 326.84 provides that specialty contractors may be licensed as residential building contractors or residential remodelers unless they are required to be licensed as specialty contractors.
6. A residential building contractor contracts to build or improve residential real estate by providing two or more special skills, including carpentry, masonry and concrete, interior finishing, exterior finishing, drywall and plaster, and roofing. A specialty contractor both builds and/or improves residential property, but by providing only one special skill. Roofers must be licensed.^[21]
7. By offering and agreeing to perform carpentry, exterior finishing and roofing, Respondent engaged in unlicensed residential building contractor activities in violation of Minn. Stat. §§ 326.84, subs. 1 and 1a, and 326.91, subd. 1(5).
8. By offering and agreeing to perform residential building contractor work after the date of the Consent Cease and Desist Order, the Respondent violated Minn. Stat. § 326.91, subd. 1(5).
9. The imposition of discipline and civil penalties against the Respondent is in the public interest.
10. Based on the above Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Commissioner of Labor and Industry take disciplinary action and assess appropriate civil penalties against the Respondent.

Dated: May 3, 2006

/s/ Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Tape-Recorded (one tape);
No Transcript Prepared.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Labor and Industry will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommended Decision. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Nancy Leppink, Deputy Commissioner, Minnesota Department of Labor and Industry, 443 Lafayette Road North, St. Paul, MN 55155 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Respondent admits and presented evidence that he designed a scheme to avoid the contractor licensing law. Respondent argues that he is exempt from statutory licensing requirements because the "Assignment of Interest" document is not a contract for work, but merely an assignment that gave the Respondent authority to deal with a homeowner's insurance company. Respondent further contends that the actual contract, a separate document titled "Terms of Agreement," provides that the homeowner will act as the general contractor and his company, Sided Designs, will be the subcontractor, thus making Respondent exempt from the contractor licensing law. Respondent's interpretations of the licensing statutes are wrong. Respondent's scheme is an illegal attempt to avoid the contractor licensing statutes.

The statute defines a residential building contractor as follows:

“Residential building contractor” means a person in the business of building residential real estate, or of contracting or offering to contract with an owner to build residential real estate, by providing two or more special skills as defined in this section. A residential building contractor may also contract or offer to contract with an owner to improve existing residential real estate. ^[22]

The special skills include carpentry, exterior finishing and roofing. ^[23] The statute prohibits anyone from performing special skills work for compensation without a license.

Prohibition. Except as provided in subdivision 3, no persons required to be licensed by subdivision 1 may act or hold themselves out as residential building contractors or residential remodelers for compensation without a valid license issued by the commissioner. ^[24]

Subdivision 3 provides exceptions to the licensing requirements. Mr. Ouellette argues that the homeowner exception applies in this case. This provision reads as follows:

Exemptions. The license requirement does not apply to:

(3) an owner or owners of residential real estate who build or improve residential real estate and who do the work themselves or jointly with the owner's own bona fide employees. ^[25]

The homeowner/bona fide employee exemption does not apply. The Terms and Agreement document plainly designated Sided Designs, Inc. as a subcontractor, not as an employee of the homeowner. Nothing in the Terms and Agreement document indicates that Mr. Ouellette was offering to perform work jointly with the homeowner as the homeowner's employee. Moreover, the Assignment of Interest provided Sided Designs would “complete said work for the total sum agreed upon by Sided Designs and my insurance company.” There is no indication in either of these documents that Mr. Ouellette intended to create an employee/employer relationship with the homeowner.

Mr. Ouellette has a history of violating Minnesota's contractor licensing laws and rules. He previously agreed to cease and desist from engaging in unlicensed work as a residential building contractor, remodeler, or roofer in the

State of Minnesota. He deliberately attempted to create a scheme that would circumvent the law. However, his scheme failed because his legal interpretations were all incorrect. Mr. Ouellette violated the Consent Cease and Desist Order.

S.M.M.

^[1] Unless otherwise specified, all references to Minnesota Statutes are to the 2004 edition, and all references to Minnesota Rules are to the 2005 edition.

^[2] Testimony of Chris Williams.

^[3] Ex. 1; Testimony of C. Williams.

^[4] Ex. 2; Testimony of C. Williams.

^[5] Ex. 3; Testimony of C. Williams.

^[6] Testimony of Matthew Eicher.

^[7] Ex. 4.

^[8] Testimony of M. Eicher.

^[9] *Id.*

^[10] Testimony of C. Williams.

^[11] Ex. 4.

^[12] Testimony of C. Williams.

^[13] Testimony of C. Williams; Minn. Stat. § 326.83 *et. seq.* Roofers are specifically required to be licensed. Testimony of C. Williams; Minn. Stat. § 326.842.

^[14] Ex. 5, Testimony of M. Eicher.

^[15] Testimony of F. Ouellette.

^[16] Testimony of Frank Ouellette

^[17] Ex. 6, Testimony of F.Ouellette.

^[18] Testimony of F. Ouellette.

^[19] Testimony of C. Williams.

^[20] Minn. R. 1400.7300, subp. 5.

^[21] Minn. Stat. § 326.842. Testimony of C. Williams.

^[22] Minn. Stat. § 326.83, subd. 15.

^[23] Minn. Stat. § 326.83, subd. 19 (c), (e) and (g).

^[24] Minn. Stat. § 326.84, subd 1b.

^[25] Minn. Stat. § 326.84, subd. 3.